CLERK, U.S. DISTRICT COURT
NOV 10 2009
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CORNELL WALKER, Petitioner, v. JAMES WALKER, Warden, Respondent.	NO. CV 08-7768-JSL(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 11/10/09, 2009.

J. SPENCER LETTS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CORNELL WALKER, Petitioner, v. JAMES WALKER, Warden, Respondent.	NO. CV 08-7768-JSL(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable J. Spencer Letts, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on November 25, 2008. Respondent filed an Answer on March 19, 2009. Petitioner filed a Reply on June 3, 2009.

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BACKGROUND

Evidence at Petitioner's trial showed that, on November 29, 2001, a joint task force of Los Angeles police officers and FBI agents was conducting a narcotics investigation in Los Angeles, using a confidential informant (Reporter's Transcript ["R.T."] 89, 254). Officers allegedly saw the informant being chased by two suspects, neither of whom was Petitioner (R.T. 254-55). Near the location where police detained the two suspects, officers allegedly observed a vehicle parked on the street with the motor running and the doors locked (R.T. 73, 106, 240). Petitioner allegedly approached, showed his car registration, and asked what was happening with his car (R.T. 74-75, 241-42, 245-46). Petitioner allegedly consented to a search of the car (R.T. 75). Officers allegedly found a loaded handgun in a hole under the rear seat (R.T. 77-78, 81, 252-53). Petitioner allegedly attempted to flee, but was apprehended after a brief struggle (R.T. 78-80, 250-51). Petitioner allegedly admitted that the gun was his (R.T. 275).

A federal indictment charged Petitioner with possession of a firearm by a felon in violation of 18 U.S.C. section 922(g). See United States v. Walker, CV 01-1277-WMB.[1] At a hearing on February 27, 2002, United States District Judge William M. Byrne, Jr. granted a defense motion to suppress the firearm (Clerk's Transcript

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[1] The Court takes judicial notice of the docket in United States v. Walker, CV 01-1277-WMB. See Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of court records).

"After Remittitur" ["Remand C.T."] 142-343). Judge Byrne subsequently dismissed the indictment with prejudice (see Order dated May 1, 2002 in United States v. Walker, CV 01-1277-WMB).

The State of California then charged Petitioner, in an Amended Information, with one count of possession of a firearm by a felon in violation of California Penal Code section 12021(a)(1) (Count One) and one count of possessing a concealed firearm in a vehicle while being within a class of persons prohibited from such possession in violation of California Penal Code sections 12025(a)(1) and (b)(4) (Count Two) (Clerk's Transcript ["C.T."] 65-68). The Amended Information further alleged that Petitioner had suffered four prior serious or violent felony convictions qualifying as "strikes" within the meaning of California's Three Strikes Law,[2] and had suffered six convictions for which he served prior prison terms within the meaning of California Penal Code section 667.5(b) (C.T. 66).

Prior to trial, Petitioner filed a motion suppress the firearm pursuant to California Penal Code section 1538.5 (Supplemental Clerk's Transcript 2-13). After a hearing, the Superior Court denied the motion (Remand C.T. 48-105).

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[2] The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code §§ 667(b) - (i) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). Petitioner was charged under both versions (C.T. 66).

Thereafter, the court granted the prosecution's request to dismiss Count Two (Supplemental Reporter's Transcript 236), and trial proceeded on Count One. The jury found Petitioner guilty of possession of a firearm by a felon as alleged in Count One (R.T. 422; C.T. 160-62). The court found true the prior conviction allegations (R.T. 467-68; C.T. 235). The court struck one of Petitioner's strikes pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996) ("Romero") (R.T. 481; C.T. 239). Petitioner received a sentence of twenty-five years to life (R.T. 481-82; C.T. 236-41).

The California Court of Appeal reversed, ruling that the court had erred in refusing to allow Petitioner's counsel to explore fully at the suppression hearing the issue of detention, and that Petitioner's trial counsel ineffectively failed to renew the motion to suppress before the trial judge (see Respondent's Lodgment 8; People v. Walker, 2004 WL 2809518 (Cal. Ct. App. 2d Dist. Dec. 8, 2004). The Court of Appeal remanded the matter "for further proceedings consistent with this opinion." People v. Walker, 2004 WL 2809518, at *7. The California Supreme Court denied Petitioner's petition for review on February 23, 2005 (Respondent's Lodgments 9, 10).

On remand, the trial court conducted a new suppression hearing and again denied the motion to suppress (Reporter's Transcript of Proceedings on May 5, 2005; July 1, 5 and 11, 2005; September 1, 2 and 19, 2005; October 6, 11, 19, 25 and 31, 2005; November 1, 2005 ["Remand R.T."] 48-263). The trial court then reinstated the judgment and sentence of twenty-five years to life (Remand R.T. 266-69, 276).

The Court of Appeal affirmed the judgment (see Respondent's Lodgment 16; People v. Walker, 2006 WL 3307077 (Cal. Ct. App. 2d Dist. Nov. 15, 2006). The California Supreme Court denied Petitioner's petition for review (Respondent's Lodgments 17, 18).

Petitioner filed a habeas corpus petition in the Superior Court, which that court denied on May 8, 2007 (Respondent's Lodgment 19, Exs. A, C). Petitioner filed a habeas corpus petition in the California Court of Appeal, which that court denied on August 29, 2007 (Respondent's Lodgments 19, 20). Petitioner filed a habeas corpus petition in the California Supreme Court on October 29, 2007, which that court ordered withdrawn on January 2, 2008 pursuant to Petitioner's request (Respondent's Lodgments 21, 22). Petitioner filed another habeas corpus petition in the California Supreme Court on December 21, 2007, which that court denied on June 11, 2008 (Respondent's Lodgments 23, 24).

PETITIONER'S CONTENTIONS

1. By excluding the transcript of the federal suppression hearing, the trial court allegedly denied Petitioner a full and fair opportunity to litigate the suppression motion (Ground One);

2. Petitioner's appellate counsel allegedly provided ineffective assistance by failing to raise a claim that trial counsel assertedly rendered ineffective assistance on remand by failing to call witnesses and to present evidence in support of the suppression motion (Ground Two);

3. The trial court's denial of the suppression motion on remand allegedly was based on an unreasonable determination of the facts and assertedly was contrary to federal law (Ground Three);

4. The trial court allegedly erred in failing to conduct a new sentencing hearing on remand (Ground Four); and

5. Petitioner allegedly received an unconstitutional sentence (Ground Five).

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), signed into law April 24, 1996, a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended); see also Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the

state court renders its decision. Lockyer v. Andrade, 538 U.S. 63 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts. . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v.

Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Davis v. Woodford, 384 F.3d 629, 637-38 (9th Cir. 2004).

In applying these standards, this Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). To the extent no such reasoned opinion exists, as where a state court rejected a claim in an unreasoned order, this Court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

DISCUSSION

I. Petitioner's Challenge to the Trial Court's Exclusion of the Transcript of the Federal Suppression Hearing Does Not Merit Habeas Relief.

A. Background

At the suppression hearing on remand, Petitioner's counsel told the court that he wished to call FBI agent Nicole Kilgore to testify, but was unable to locate Kilgore (Remand R.T. 209). The parties stipulated that Kilgore was unavailable (Remand R.T. 209-10). Petitioner's counsel sought to introduce Kilgore's testimony from the

federal suppression hearing (Remand R.T. 233).[3] The prosecution objected on the ground that, under California Penal Code section 1291(a)(2), the federal transcript was not admissible because the state was not a party to the federal proceeding (Remand R.T. 233, 238-39).[4] The court indicated that, because the prosecution called Kilgore as a witness at the federal suppression hearing, and hence would have had no "right and opportunity" to cross-examine her, the proper Evidence Code section was California Evidence Code section 1291(a)(1) (Remand R.T. 238-39). Section 1291(a)(1) provides that evidence of former testimony is not made inadmissible by the hearsay rule "if the declarant is unavailable and the former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such a person. . . ."

The court inquired whether there was "any indication that in any way the Los Angeles County District Attorney's Office participated in the federal prosecution" (Remand R.T. 239). Petitioner's counsel said "[n]ot that I know of," and the prosecutor said there was "no such

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[3] The prosecutor conceded that Kilgore's preliminary hearing testimony was admissible, and the court admitted that testimony (R.T. 233).

[4] California Evidence Code section 1291(a)(2) provides that evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

evidence" (Remand R.T. 239). The court analogized the situation to that in People v. Meredith, 11 Cal. App. 4th 1548, 1558-59, 15 Cal. Rptr. 2d 285 (1992), which held that a prior determination in a federal court suppression hearing has collateral estoppel effect in a subsequent state proceeding only if state prosecutors actively participated in the federal prosecution (Remand R.T. 239-40). The court ruled Kilgore's federal testimony inadmissible (Remand R.T. 242).

However, the court also indicated a desire to make an "alternative ruling," and asked the attorneys what, if anything, contained in the federal transcripts would affect the issue whether Petitioner consented to the search (Remand R.T. 248-49). Petitioner's counsel said that the federal transcript contained Kilgore's statement that officers did not believe that Petitioner was a suspect in the robbery (Remand R.T. 250). The court agreed with counsel's characterization of the federal transcript, but stated that, while the officers might not have been suspicious of Petitioner when he approached them, the officers believed that the car might have been involved in the robbery (Remand R.T. 250-51). The court again asked Petitioner's counsel what the federal transcript contained that counsel thought was significant (Remand R.T. 251-52). Counsel said that Kilgore had testified in the federal hearing that the officers would have stopped Petitioner if he had attempted to walk away (Remand R.T. 252). The court responded that the officers' subjective intent was irrelevant (Remand R.T. 252).

The court said:

> . . . As I told you, I'm planning on making a ruling, both based on the inadmissibility of the federal transcript, and also I believe my ruling in this case would be the same whether or not I may have been ruling the federal transcript was inadmissible. So I just want to make it absolutely clear that I want to give you a full opportunity to argue as if the federal transcript were received. Because I think there was free and voluntary consent, whether or not the federal transcript was properly received by this court. And since I'm going to make an alternative tentative ruling, I want to make it absolutely clear that I want to give you the opportunity to argue the case as if I had received the federal transcript.

(Remand R.T. 253-54).

The court asked if Petitioner's counsel had anything further to say regarding the federal transcript (Remand R.T. 254). Petitioner's counsel conferred with Petitioner (Remand R.T. 254). Petitioner's counsel then told the court that in the federal hearing Kilgore had testified that the officers had been trying to get into the car when Petitioner approached (Remand R.T. 254).

The court denied the motion (Remand R.T. 263). The court found that Petitioner had consented to the search, and that any detention did not occur until after officers found the gun (Remand R.T. 255-59). Out of an "abundance of caution," the court ruled, alternatively, that if the federal transcript had been admitted, the court still would

have found that Petitioner consented to the search (Remand R.T. 259).[5]

B. Discussion

Petitioner contends that the exclusion of the federal transcript violated the Constitution, by assertedly denying Petitioner the opportunity to litigate his Fourth Amendment claim fully and fairly (Petition, p. 5; Reply, pp. 9-14). Petitioner raised this claim in his habeas petition filed in the California Supreme Court, which that court denied summarily (see Respondent's Lodgments 23, 24). Therefore, this Court must conduct an independent review to determine whether the state court decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d at 982.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. at 68. Allegations of state law error are not cognizable on federal habeas corpus review. Id. at 67-68. In limited circumstances, however, the exclusion of crucial evidence may violate the Constitution. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a

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[5] The court also ruled that the officers had probable cause to search Petitioner's car in the absence of consent (Remand R.T. 261-62).

meaningful opportunity to present a complete defense") (citations and internal quotations omitted); see also Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Here, however, the trial court did not deny Petitioner a "meaningful opportunity" to present his evidence. Although the court ruled the federal transcript inadmissible as a matter of state law, such ruling was essentially academic. The court nevertheless allowed Petitioner's counsel to argue that testimony in the federal transcript showed the search assertedly was unlawful. The court then issued an alternative ruling denying Petitioner's suppression motion after consideration of counsel's arguments pertaining to the federal transcript. In these circumstances, Petitioner plainly has not shown that the California Supreme Court's rejection of Petitioner's claim was contrary to, or an unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on Ground One of the Petition.[6]

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[6] To the extent Petitioner asserts, in Ground One, that the trial court erred in ruling that Petitioner consented to the search and that probable cause supported the search (see Reply, pp. 12-14), such assertions replicate the claim asserted in Ground Three of the Petition, which the Court addresses below.

II. Petitioner's Claim of Ineffective Assistance of Appellate Counsel Does Not Merit Habeas Relief.

A. Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted). For purposes of habeas review under 28 U.S.C. section 2254(d), Strickland sets forth clearly established Federal law as determined by the United States Supreme Court. See Williams v. Taylor, 529 U.S. at 391 (citation and quotations omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular

case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." Karis v. Calderon, 283 F.3d 1117, 1130 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (citation and quotations omitted).

The standards set forth in Strickland govern claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285-86 (2000); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001), cert. denied, 535 U.S. 995 (2002). Appellate counsel has no constitutional obligation to raise all non-frivolous issues on appeal. Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." Id. Appellate counsel's failure to raise an issue on direct appeal cannot constitute ineffective assistance when "the appeal would not have provided grounds for reversal." Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) (citation omitted).

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B. Discussion

Petitioner contends his appellate counsel rendered ineffective assistance by failing to raise on appeal a claim that trial counsel ineffectively failed to present witnesses and evidence at the suppression hearing on remand (Petition, p. 5). The Petition does not identify the witnesses and evidence Petitioner contends should have been presented. Such conclusory allegations do not warrant habeas relief. See Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995), cert. denied, 517 U.S. 1143 (1996) (conclusory allegations unsupported by a statement of specific facts do not warrant habeas relief).

In the Reply, however, Petitioner states:

> Petitioner asserts that where his claims specifically address the significant error of counsel during the Remanded 1539.5 hearing, and the prejudice to petitioner where counsel failed to point out that it was prior counsel's ineffective assistance during the preliminary hearing for failure to impeach Agent Kilgore with her federal suppression hearing testimony, that was the basis for the court on remand to deny admittance of the federal suppression hearing transcripts (for purposes of challenging credibility of that witness), constituted excusable neglect on the part of petitioner, to afford the court to allow the admittance of the federal suppression hearing testimony.

(Reply, p. 15). While the meaning of this statement is not entirely

clear, it appears Petitioner contends that appellate counsel ineffectively failed to argue on appeal that trial counsel should have argued, at the suppression hearing on remand, that prior counsel at the preliminary hearing ineffectively failed to impeach Kilgore with her federal testimony. Petitioner does not identify any particular testimony of Kilgore at the federal hearing that counsel assertedly should have used to impeach Kilgore at the preliminary hearing. Such unspecific allegations are insufficient to warrant habeas relief. See James v. Borg, 24 F.3d 20, 26 (9th Cir.), cert. denied, 513 U.S. 935 (1994) (Strickland claim insufficient where petitioner failed to identify what evidence counsel should have presented which would have aided petitioner). To the extent Petitioner contends that, if counsel at the suppression hearing on remand had raised the issue of prior counsel's purported ineffectiveness at the preliminary hearing, the court would have rectified the alleged ineffectiveness by admitting any or all of the federal transcript, Petitioner is mistaken. As indicated previously, at the suppression hearing on remand the court deemed the issue of the federal transcript's admissibility to be governed by California Evidence Code section 1291(a)(1). Whether counsel was or was not ineffective at the preliminary hearing was immaterial to the issue of the admissibility of the federal transcript under that statute.

Petitioner's Reply also asserts that Petitioner sought to have counsel (apparently counsel at the suppression hearing on remand) subpoena the tow truck operator who allegedly impounded Petitioner's car (Reply, p. 15). Petitioner asserts that the tow truck operator could have testified that the car had manual door locks, which

allegedly would have shown the purported falsity of Kilgore's asserted testimony that Petitioner used a "clicker" to unlock the car (Reply, p. 15). Petitioner apparently contends appellate counsel ineffectively failed to raise on appeal trial counsel's alleged ineffectiveness in this regard.

However, where analysis of a claim of ineffective assistance of trial counsel would require recourse to matters outside the appellate record, California law requires the claim to be asserted in a petition for writ of habeas corpus, not on direct appeal. See, e.g., People v. Mendoza Tello, 15 Cal. 4th 264, 267-68, 62 Cal. Rptr. 2d 437, 933 P.2d 1134 (1997); People v. Pope, 23 Cal. 3d 412, 426-28, 152 Cal. Rptr. 732, 590 P.2d 859 (1979). "[B]ecause, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct." People v. Wilson, 3 Cal. 4th 926, 936, 13 Cal. Rptr. 2d 259, 838 P.2d 1212 (1992), cert. denied, 507 U.S. 1006 (1993); see also People v. Frye, 18 Cal. 4th 894, 979-80, 77 Cal. Rptr. 2d 25, 959 P.2d 183 (1998), cert. denied, 526 U.S. 1023 (1999) (citations and internal quotations omitted) ("a reviewing court will reverse a conviction on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission") (citations and internal quotations omitted). Here, appellate counsel reasonably could have

determined that Petitioner's claim that trial counsel ineffectively failed to subpoena the tow truck operator encompassed matters outside the appellate record, and hence could not be brought on direct appeal. Petitioner cannot properly claim ineffective assistance of appellate counsel in failing to raise these issues in a habeas corpus petition, because Petitioner enjoyed no right to counsel in state post-conviction proceedings. See Murray v. Giarratano, 492 U.S. 1, 7-10 (1989); Pennsylvania v. Finley, 481 U.S. 551, 556 (1987); Wainwright v. Torna, 455 U.S. 586, 587-88 (1982); Cook v. Schriro, 538 F.3d 1000, 1027 (9th Cir. 2008), cert. denied, 129 S. Ct. 1033 (2009).

For the foregoing reasons, Petitioner is not entitled to habeas relief on Ground Two of the Petition.[7]

III. Petitioner's Fourth Amendment Claim Is Barred by Stone v. Powell

"[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence [was] obtained in an unconstitutional search or seizure . . . ." Stone v. Powell, 428 U.S. 465, 494 (1976); see also Woolery v. Arave, 8 F.3d 1325, 1326 (9th Cir. 1993), cert. denied, 511 U.S. 1057 (1994). "The

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[7] This Court need not determine whether to apply the standard of review set forth in 28 U.S.C. section 2254(d) to this claim. For the reasons discussed herein, Petitioner has failed to demonstrate that appellate counsel acted ineffectively in the manner alleged by Petitioner. Therefore, Petitioner has failed to demonstrate that Petitioner is "in custody in violation of the Constitution or laws or treaties of the United States" as required by 28 U.S.C. section 2241(c)(3).

relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided." Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996) (citations omitted).

Petitioner received an opportunity for full and fair litigation of his Fourth Amendment claims in the state courts, and fully availed himself of that opportunity. See Gordon v. Duran, 895 F.2d 610, 613-14 (9th Cir. 1990) (California Penal Code section 1538.5 provides a defendant with a "full and fair" opportunity to litigate a Fourth Amendment search and seizure claim in state court); see also Abell v. Raines, 640 F.2d 1085, 1088 (9th Cir. 1981) (petitioner received full and fair opportunity to litigate where issues were briefed and were considered by state courts). "All Stone v. Powell requires is the initial opportunity for a fair hearing." Caldwell v. Cupp, 781 F.2d 714, 715 (9th Cir. 1986) (citation omitted). "Such an opportunity for a fair hearing forecloses this court's inquiry, upon habeas corpus petition, into the trial court's subsequent course of action. . . ." Id. (citations omitted).[8]

Petitioner's allegations that the state court erred in denying the motion to suppress are unavailing. "Under Stone a federal district court may not relitigate a fourth amendment issue tried fully and fairly in a state court, regardless of its view of the correctness

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[8] Petitioner's allegation that he did not receive a full and fair opportunity to litigate his challenge to the search because the trial court allegedly excluded the federal suppression hearing transcript lacks merit for the reasons discussed in Section I, above.

of the state decision." Mack v. Cupp, 564 F.2d 898, 901 (9th Cir. 1977) (emphasis added); accord Siripongs v. Calderon, 35 F.3d 1308, 1321 (9th Cir. 1994), cert. denied, 513 U.S. 1183 (1995) ("the correctness of the state court resolution" of a Fourth Amendment claim is "an issue which Stone v. Powell makes irrelevant"). Any allegation that the state court's factual findings were not supported by the evidence fails to demonstrate that Petitioner lacked a full and fair opportunity to litigate his Fourth Amendment claims in state court. See Moormann v. Schriro, 426 F.3d 1044, 1053 (9th Cir. 2005), cert. denied, 548 U.S. 927 (2006). For these reasons, Petitioner is not entitled to habeas relief on Ground Three of the Petition.

IV. Petitioner's Challenge to the State Court's Refusal to Conduct a New Sentencing Hearing on Remand Does Not Merit Habeas Relief.

Petitioner contends that the trial court erred in refusing to conduct a new sentencing hearing following denial of the suppression motion on remand (Petition, p. 6). As mentioned above, in the Court of Appeal's first opinion, the Court of Appeal reversed the judgment and remanded the matter "for further proceedings consistent with this opinion." See People v. Walker, 2004 WL 2809518, at *7. After the trial court denied Petitioner's motion to suppress on remand, Petitioner's counsel argued that the court should reset the matter for a new trial (Remand R.T. 263-64). The court ruled, as a matter of California law, that an order reinstating the judgment was appropriate and consistent with the Court of Appeal's opinion (Remand R.T. 268-69). The Court of Appeal later affirmed, holding under state law that the trial court "was correct in its assumption that following a new

suppression hearing, if the motion [to suppress] was denied, the court was required to reinstate the judgment." People v. Walker, 2006 WL 3307077, at *4.

As previously indicated, in conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. Estelle v. McGuire, 502 U.S. at 68. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Id. at 67-68. To the extent Petitioner raises a claim of alleged state law error, any such claim is not cognizable on federal habeas corpus review. Id.

To the extent Petitioner argues that the trial court's refusal to conduct a new sentencing hearing was "fundamentally unfair" in violation of Due Process, Petitioner's claim lacks merit. Petitioner argues that the judge on remand made a purported "finding" that Petitioner had nothing to do with the robbery, and that in light of asserted "new facts" including this alleged "finding" and Petitioner's testimony at the suppression hearing on remand concerning Petitioner's character and credibility, the court on remand should have held a new Romero hearing (see Reply, p. 16, referencing Petitioner's Opening Brief on Appeal, Respondent's Lodgment 13, at 31-35).[9] However, the sentencing court had not based Petitioner's sentence on any belief that Petitioner was involved in the robbery (see R.T. 474-82).

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[9] In ruling on the suppression motion on remand, the trial court "accept[ed] Mr. Walker's position that he had nothing to do with the robbery in this case" (R.T. 261).

Neither the prosecutor nor the court took issue with the statement of Petitioner's counsel, at the Romero hearing, that the case "didn't involve Mr. Walker being in the commission of any crime while in possession of the firearm" (R.T. 476). At sentencing, neither counsel nor the judge mentioned any purported involvement of Petitioner in the robbery. On this record, Petitioner has not shown that the trial court's refusal to conduct a new sentencing hearing was "fundamentally unfair."

For the foregoing reasons, Petitioner is not entitled to habeas relief on Ground Four of the Petition.

V. Petitioner's Challenge to His Sentence Does Not Merit Habeas Relief.

Petitioner contends his sentence violates the Eighth Amendment (Petition, p. 6). The Court of Appeal rejected this claim, citing Ewing v. California, 538 U.S. 11 (2003), and Lockyer v. Andrade, 538 U.S. 63 (2003). See People v. Walker, 2008 WL 3307077, at *5-6).

The Eighth Amendment forbids the imposition of "cruel and unusual punishments." United States Constitution, Amend. VIII. In Rummel v. Estelle, 445 U.S. 263, 265-66, 284-85 (1980) ("Rummel"), the Supreme Court upheld a recidivist sentence of life with the possibility of parole for the crime of obtaining $120.75 by false pretenses, following prior convictions for fraudulent use of a credit card to obtain $80 worth of goods and services and passing a forged check for $28.36. In Solem v. Helm, 463 U.S. 277, 289-90, 296 (1983) ("Solem"),

the Court struck down a recidivist sentence of life without the possibility of parole for uttering a "no account" check for $100, "one of the most passive felonies a person could commit," where the petitioner had three prior third-degree burglary convictions and convictions for obtaining money by false pretenses, grand larceny and driving while intoxicated. In Harmelin v. Michigan, 501 U.S. 957, (1991), five Justices, although in disagreement regarding the rationale, upheld a sentence of life without the possibility of parole for a first offense of possession of more than 650 grams of cocaine. In a concurring opinion, Justice Kennedy, joined by Justices O'Connor and Souter, opined that a non-capital sentence could violate the Eighth Amendment if it were grossly disproportionate to the crime. Id. at 996-1009. The Ninth Circuit subsequently recognized Justice Kennedy's concurring opinion as the "rule" of Harmelin. See United States v. Bland, 961 F.2d 123, 128-29 (9th Cir.), cert. denied, 506 U.S. 858 (1992).

In 2003, the United States Supreme Court decided two cases involving the constitutionality of sentences imposed under California's Three Strikes Law. In Ewing v. California, 538 U.S. 11 (2003) ("Ewing"), the Court upheld a sentence of twenty-five years to life for felony grand theft consisting of the non-violent theft of three golf clubs, where the defendant's prior offenses included convictions for robbery, theft, grand theft auto, petty theft with a prior, battery, multiple burglaries, possession of drug paraphernalia, appropriation of lost property, unlawful possession of a firearm and trespassing. In Lockyer v. Andrade, 538 U.S. 63 (2003) ("Andrade"), the Court upheld, under the standard of review set forth in 28 U.S.C.

§ 2254(d), the California Court of Appeal's determination that a total sentence of fifty years to life for two convictions of petty theft with a prior theft-related conviction, arising out of two non-violent incidents in which the petitioner shoplifted videotapes, was not unconstitutional. In Andrade, the petitioner's prior convictions were for theft, residential burglary, transportation of marijuana, and escape. Andrade, 538 U.S. at 66-67.

In Andrade, the United States Supreme Court acknowledged that, "in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow." Andrade, 538 U.S. at 72. However, the Court observed that "one governing legal principle emerges as 'clearly established' under [28 U.S.C.] § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." Id.

Thus, "[t]he threshold determination in the eighth amendment proportionality analysis is whether [Petitioner's] sentence was one of the rare cases in which a . . . comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992, cert. denied, 506 U.S. 858 (1992) (citations and quotations omitted); see Andrade, 538 U.S. at 73 (gross proportionality principle "applicable only in the 'exceedingly rare' and 'extreme' case"; citations omitted); Harmelin v. Michigan, 501 U.S. at 1001 (1991) (Kennedy, J., concurring) ("The Eighth Amendment does not require strict proportionality between crime and sentence"); see also Cocio v.

Bramlett, 872 F.2d 889, 892 (9th Cir. 1989) ("we are required to defer to the power of a state legislature to determine the appropriate punishment for violation of its laws based on principles of federalism, unless we are confronted with a rare case of a grossly disproportionate sentence"). Petitioner's claim fails at this threshold level.

In determining whether to infer gross disproportionality, the Court should examine whether Petitioner's sentence is justified by the gravity of his triggering offense and his criminal history. See Ramirez v. Castro, 365 F.3d 755, 768 (9th Cir. 2004). The Ninth Circuit has suggested that a Three Strikes sentence may not survive constitutional attack where both the triggering offense and the petitioner's prior convictions were relatively minor and non-violent. See id. at 767-73 (holding unconstitutional a Three Strikes sentence for one count of petty theft with a prior (the theft of a VCR worth $199), where the petitioner's prior criminal history consisted solely of two 1991 convictions for second-degree robbery obtained through a guilty plea, for which the petitioner's total sentence was one year in county jail and three years' probation); Reyes v. Brown, 399 F.3d 964, 969-70 (9th Cir. 2005), cert. denied, 547 U.S. 1218 (2006) (petitioner received a Three Strikes sentence for the triggering felony offense of perjury on a driver's license application, and his strikes consisted of a non-violent juvenile residential burglary conviction and a conviction for armed robbery; Ninth Circuit remanded to the district court for an evidentiary hearing on the issue of whether the armed robbery conviction was a "crime against a person" or involved

violence).[10]

However, the Ninth Circuit has upheld Three Strikes sentences imposed for the offense of petty theft with a prior where the petitioner had a significant criminal record including a prior conviction or convictions involving violence. In Rios v. Garcia, 390 F.3d 1082 (9th Cir. 2004), cert. denied, 546 U.S. 827 (2005), the Ninth Circuit upheld a Three Strikes sentence for petty theft with a prior, distinguishing Ramirez v. Castro because the petitioner in Rios had struggled with a store loss prevention officer while committing the triggering offense. Rios v. Garcia, 390 F.3d at 1086. The Court further distinguished Ramirez v. Castro because the petitioner in Rios had a prior robbery strike that "involved the threat of violence, because his cohort used a knife." Id. Moreover, the petitioner in Rios had a "lengthy criminal history and [had] been incarcerated several times." Id. Similarly, in Nunes v. Ramirez-Palmer, 485 F.3d 432, 439 (9th Cir.), cert. denied, 128 S. Ct. 404 (2007), the Ninth Circuit upheld a Three Strikes sentence for petty theft with a prior where the petitioner's prior convictions included convictions for rape, burglary, theft and robbery. In Taylor v. Lewis, 460 F.3d 1093, 1100-01 (9th Cir. 2006), the Ninth Circuit upheld a Three Strikes sentence for possession of .036 grams of cocaine, where petitioner's prior convictions included felony convictions for second degree

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[10] On remand, the District Court denied relief after determining that the armed robbery had involved the use of a knife. Reyes v. Calderon, No. CV 00-608, "Order, etc." (C.D. Cal. Dec. 7, 2006) (unpublished). Reyes filed a notice of appeal, but the Ninth Circuit denied a certificate of appealability. See Reyes v. Calderon, No. 07-55050, Order (9th Cir. May 25, 2007) (unpublished).

burglary, vehicle theft, voluntary manslaughter with a weapon-use enhancement, and robbery with the use of a firearm, and several misdemeanor convictions.

Recently, in Gonzalez v. Duncan, 551 F.3d 875 (9th Cir. 2008), the Ninth Circuit ruled unconstitutional a Three Strikes sentence for failing to update the petitioner's annual sex offender registration within five working days of his birthday, where the petitioner's prior convictions were for cocaine possession, commission of a lewd act on a child under the age of fourteen, attempted rape by force, and second-degree robbery. Gonzalez v. Duncan suggests that a Three Strikes sentence for a "technical"[11] and victimless violation of the law may violate the Constitution even though the petitioner's criminal history may not be completely devoid of violence, at least where the current offense is "based on a violation of a technical regulatory requirement that resulted in no social harm and to which little or no moral culpability attaches," and "does not reveal any propensity to recidivate." Id. at 887.

Petitioner's triggering offense, possession of a loaded firearm by a felon, is not a "technical" violation of law involving no social harm or revealing no propensity to recidivate, and is not as passive as the shoplifting offenses in Andrade. "[B]eing a felon in

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[11] The Gonzalez court quoted a California Court of Appeal case in which the Court of Appeal deemed Gonzalez' triggering offense "the most technical violation of the [sex offender] registration requirement" which "by itself, pose[s] no danger to society." Gonzalez v. Duncan, 551 F.3d at 877 (citation omitted).

possession of a firearm is plainly not as 'non-violent' as shoplifting sports equipment or stealing videotapes." Capps v. Giurbino, 2008 WL 5234720, at *6 (E.D. Cal. Dec. 16, 2008); see also Bethea v. Salazar, 2008 WL 4381545 (C.D. Cal. Sept. 23, 2008) ("petitioner's principal felony count for felon in possession of a *firearm* is considerably more serious and dangerous than the petty theft felonies that triggered the *Lockyer* defendant's sentence of 50 years to life (theft of videotapes worth less than $150)") (original emphasis); People v. Cooper, 43 Cal. App. 4th 815, 51 Cal. Rptr. 2d 106 (1996) ("the California legislature views the possession of a handgun by an ex-felon to be a serious offense").

Also, and as the Court of Appeal pointed out, Petitioner's criminal history included: (1) a 1980 second degree burglary conviction; (2) 1984 convictions for carrying a loaded firearm and carrying a concealed weapon; (3) 1985 convictions for two robberies and three burglaries; (4) a 1989 conviction for possession of drugs or alcohol in prison; (5) a 1993 robbery conviction; (6) a 1998 prostitution conviction; and (7) several parole violations. See People v. Walker, 2006 WL 3307077, at *5; see also C.T. 163-231 [People's Sentencing Memorandum and attached exhibits]; C.T. 244-56 [Probation Report]. Documents attached to the prosecution's sentencing memorandum indicate that the 1985 robbery convictions involved: (1) an incident where Petitioner kicked the victim and used a belt to choke her; and (2) an incident where Petitioner used a gun to force his way into the victim's home, pushed her into her bedroom, and threw her on the bed (C.T. 202-04).

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Given the potential for violence demonstrated by the triggering offense and Petitioner's lengthy criminal history which included crimes involving violence or the threat of violence, this Court cannot conclude that the Court of Appeal's decision upholding Petitioner's Three Strikes sentence was contrary to, or an unreasonable application of, clearly established Supreme Court law. See 28 U.S.C. § 2254(d); see also Bethea v. Giurbino, 2008 WL 4381545, at *6 (upholding Three Strikes sentence for possession of a firearm by a felon, armed criminal action and carrying a firearm in a public place, where petitioner's criminal history included five robbery convictions); Curtis v. Giurbino, 2005 WL 2789071, at *12 (E.D. Cal. Oct. 25, 2005), aff'd, 248 Fed. App'x 773 (9th Cir.), cert. denied, 128 S. Ct. 662 (2007) (upholding two consecutive Three Strikes sentences for possession of a firearm by a felon and evading an officer, where prior convictions included two robberies in which petitioner struck the victims). Petitioner is not entitled to habeas relief on Ground Five of the Petition.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: June 22, 2009.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.